No. 17-647

IN THE

Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

TERESA FICKEN SACHS
Counsel of Record
MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN
2000 Market Street, Suite 2300
Philadelphia, PA 19103
(215) 575-2000
tfsachs@mdwcg.com

Attorneys for Respondent

277973

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether there is any compelling reason to grant the Petition and reconsider *Williamson County*'s state procedures requirement, where this Court has repeatedly upheld that requirement, decades of case law have applied it, the requirement is consistent with the Fifth Amendment and principles of federalism, this Court has recently denied certiorari in response to the same arguments, and where this case would be a particularly inappropriate one for any reconsideration of *Williamson County*.

2. Whether there is any compelling reason to grant the Petition and reconsider *Williamson County*'s state procedures requirement, where there is no "circuit split" as alleged by Petitioner.

3. Whether there is any compelling reason to grant the Petition and reconsider *Williamson County*'s state procedures requirement, where the Third Circuit's opinion is fully consistent with this Court's jurisprudence.

CORPORATE DISCLOSURE STATEMENT

Scott Township is a subdivision of Lackawanna County, in the Commonwealth of Pennsylvania. The Township has no parent corporation or corporate stock.

LIST OF PARTIES

Carl S. Ferraro is no longer interested in this matter.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

LIST OF PARTIES iii

TABLE OF CONTENTS iv

TABLE OF CITED AUTHORITIES vi

INTRODUCTION 1

COUNTERSTATEMENT OF THE CASE 2

I. Relevant Facts 3

II. Procedural History 3

A. The State and Federal Pleadings 3

B. The District Court's Dismissal 4

C. The Third Circuit's Affirmance 5

REASONS FOR DENYING THE PETITION 6

Table of Contents

Page

I. There is No Important Question to Consider: This Court Has for Decades Reaffirmed *Williamson County*'s Prudential State Litigation Requirement, has Denied Certiorari in Response to the Same *Williamson County* Arguments, and this Case Would be Particularly Inappropriate for Any Reconsideration of *Williamson County* 8

A. Petitioner is not making a "facial" challenge; rather, her claim is "unavoidably" a claim for compensation 9

B. Petitioner's criticisms of *Williamson County* misstate the reach of that case 11

C. This Court has rejected other recent petitions making the same arguments against *Williamson County* 16

II. There is no Conflict Among the Lower Courts Regarding the Application of *Williamson County* Ripeness Requirements to Claims for Compensation 18

III. There is no Conflict Between the Third Circuit's Decision and this Court's Decision in *Williamson County* 23

CONCLUSION 26

TABLE OF CITED AUTHORITIES

Page

CASES

A Forever Recovery, Inc. v. Township of Pennfield, 2013 U.S. Dist. LEXIS 189092 (W.D. Mich. 2013), *aff'd*, 606 Fed. Appx. 279 (6th Cir. 2015) 14

Allen v. McCurry, 449 U.S. 90 (1980) 14

Alto Eldorado Partnership v. County of Santa Fe, 634 F.3d 1170 (10th Cir. 2011), *cert. denied*, 565 U.S. 880 (2011) 22, 23

Alto Eldorado Partnership v. Santa Fe County, 565 U.S. 880 (October 3, 2011) 6, 7, 16

Arrigoni Enterprises, LLC v. Town of Durham, 136 S. Ct. 1409, 2016 U.S. LEXIS 2830 (April 25, 2016) 6, 14, 16

Arrigoni Enters., LLC v. Town of Durham, 18 F. Supp. 3d 188 (D. Conn. 2014) 16

Asociacion de Subscripcion Conjunta del Seguro de Responsibilidad Obligatorio v. Flores Galarza, 484 F.3d 1 (1st Cir. 2007) 12, 19

Cited Authorities

Page

Clayland Farm Enterprises, LLC v. Talbot County, Md., 672 F. App'x 240 (4th Cir. 2016) 19

Connolly v. Pension Ben. Guar. Corp., 475 U.S. 211 (1986) 25

County Concrete Corp. v. Town of Roxbury, 442 F.3d 159 (3d Cir. 2006) 18-19

Cowell v. Palmer Township, 263 F.3d 286 (3d Cir. 2001) 8

F.C.C. v. Florida Power Corp., 480 U.S. 245 (1987) 25

First English Evan. Luth. Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 15

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) 12, 24

Holliday Amusement Co. of Charleston South Carolina, 493 F.3d 404 (4th Cir. 2007) 20

International Union of Operating Engineers Local 139 v. Schimel, 863 F.3d 674 (7th Cir. 2017) 20

Cited Authorities

Page

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 24

Linde Enters., Inc. v. Lackawanna River Basin Sewer Auth., 911 A.2d 658 (Pa. Commw. 2006) 9

Lingle v. Chevron USA, Inc., 544 U.S. 528 (2005) 12

Migra v. Warren City School Dist. Bd. of Ed., 465 U.S. 75 (1984) 14

Muscarello v. Ogle County Bd. of Com'rs, 610 F.3d 416 (7th Cir. 2010), *cert. denied*, 562 U.S. 1200 (2011) 20

Opulent Life Church v. City of Holly Springs, Miss., 697 F.3d 279 (5th Cir. 2012) 21, 25

Peters v. Village of Clifton, 498 F.3d 727 (7th Cir. 2007), *cert. denied*, 552 U.S. 1251 (2008) 20, 25

Philip Morris, Inc. v. Reilly, 312 F.3d 24 (1st Cir. 2002) 19

Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) 22

Page

San Remo Hotel, L.P. v. City & Cnty. of San Francisco, 545 U.S. 323 (2005) ..... *passim*

Sansotta v. Town of Nags Head, 724 F.3d 533 (4th Cir. 2013) 14

Sherman v. Town of Chester, 752 F.3d 554 (2d Cir. 2014) 14

Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401 (9th Cir. 1996) 21, 22

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) 24

Surf and Sand, LLC v. City of Capitola, 377 F. App'x 662 (9th Cir. 2010) 22

Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach, Fla., 727 F.3d 1349 n.6 (11th Cir. 2013) 21

Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura, 371 F.3d 1046 (9th Cir. 2004) 22

Wayside Church v. Van Buren County, 847 F.3d 812 (6th Cir. Mich., Feb. 10, 2017) 17

Cited Authorities

Page

Wayside Church v. Van Buren County,
2012 U.S. LEXIS 6615 (October 30, 2017) 2

Wayside Church v. Van Buren County,
2017 U.S. LEXIS 6615 (U.S., Oct. 30, 2017) 6, 17

Wilkins v. Daniels,
744 F.3d 409 (6th Cir. 2014).....12, 21

Williamson County Regional Comm'n v. Hamilton Bank,
473 U.S. 172 (1985)..... *passim*

York Rd. Realty Co., L.P. v. Cheltenham Twp.,
136 A.3d 1047 (Pa. Commw. 2016) 9

STATUTES AND OTHER AUTHORITIES

U.S. Const. Amend. I 4

U.S. Const. Amend. IV.....4

U.S. Const. Amend. V..... *passim*

U.S. Const. Amend. XIV 4

U.S. Const. Art. III, § 2 15

42 U.S.C. § 1983.....4

Cited Authorities

Page

26 Pa. C.S. §§ 101-1106 8

26 Pa .C.S. § 102(a) 9

8-926 Pa. C.S. § 701.....

Sup. Ct. R. 10 1

INTRODUCTION

There are no compelling reasons to grant the Petition for Writ of Certiorari. *See* Sup. Ct. R. 10. There is no conflict between the Third Circuit's decision and this Court's decision in *Williamson County Regional Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), and there is no conflict among the Circuit courts as to the application of *Williamson County* to claims like this one, in which Petitioner is seeking just compensation for a taking.

In *Williamson County*, this Court held that a claim alleging a Fifth Amendment taking becomes ripe only after (1) the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue, and (2) the plaintiff has unsuccessfully exhausted the state's procedures for seeking just compensation, so long as the provided procedures by the state are adequate. It is undisputed that Pennsylvania law provides complete and adequate procedures for compensation, and that Petitioner chose not to pursue them. Petitioner instead seeks to avoid or invalidate the state exhaustion requirement.

Petitioner's arguments seeking to overturn *Williamson County*, and the decades of precedent applying it, misapprehend the case law and conflate two distinct concepts, as the Third Circuit's thorough opinion explains. This case would be a particularly inappropriate one to seek reversal of *Williamson County* in any event, because Petitioner's speculative, theoretical criticisms of *Williamson County* relate to factual scenarios not present here.

This Court has consistently upheld *Williamson County*'s state litigation requirement and denied certiorari in cases making the same arguments against *Williamson County*, most recently on October 30, 2017, just over two months ago. *See Wayside Church v. Van Buren County*, 2012 U.S. LEXIS 6615 (October 30, 2017). This Petition should likewise be denied.

COUNTERSTATEMENT OF THE CASE

This is one of two cases brought by Petitioner Rose Mary Knick against the Township of Scott, in Lackawanna County, Pennsylvania. The Township enacted an ordinance regulating cemeteries on public and private property, including one on Knick's property. Knick sued the Township in state court, challenging the ordinance, but has not pursued that case or sought compensation in the state court. Knick also filed this federal case, claiming that she is entitled to just compensation on the basis that the ordinance constitutes a taking under the Fifth and Fourteenth Amendments.

The District Court (the Honorable A. Richard Caputo) dismissed Knick's Takings claim as unripe, because Pennsylvania law provides a constitutionally adequate process for obtaining just compensation for the taking of property, and Knick failed to pursue that process. (*See* Appendix B).[1] The Third Circuit affirmed in a unanimous published opinion authored by Chief Judge D. Brooks Smith. (*See* Appendix A).

Petitioner has now filed a Petition for Writ of

1. The Appendix references are to the Appendices to Knick's Petition for Writ of Certiorari.

Certiorari. Petitioner still has not pursued compensation in state court.

I. Relevant Facts

Petitioner Knick owns approximately 90 acres of property in Scott Township, with a residence, farmland and grazing areas. (B-2). After a citizen inquiry in 2008, the Township Supervisors discussed the existence of an alleged ancient burial ground on Petitioner's property.[2] (B-3). In 2012, the Township enacted an ordinance ("the Cemetery Ordinance") addressing the operation and maintenance of cemeteries. (A-2). The Cemetery Ordinance applies to public and private cemeteries, and requires that cemeteries be properly maintained and accessible to the public. (A-2, 3). In 2013, Petitioner was determined to be in violation of the Cemetery Ordinance. (A-4).

II. Procedural History

A. The State and Federal Pleadings

In May 2013, Petitioner filed a complaint for declaratory and injunctive relief in the Lackawanna County Court of Common Pleas. Petitioner asked the state court to declare the Cemetery Ordinance unconstitutional, to prohibit and enjoin the Township from enforcing it, and

2. Scott Township residents Robert Vail, Jr., and his father, Robert Vail, Sr., identified the tombstones of their relatives, including their ancestor and Revolutionary War veteran Micah Vail, on the Knick property. *See* http://thetimes-tribune.com/news/cemetery-dispute-heads-to-federal-court-1.1808245 (last visited December 30, 2017).

to award her other relief including attorneys' fees. (A-4). However, after the state court ruled in October 2014 that the case was not in the proper posture for the relief requested by Petitioner (A-4, 5), Petitioner did not seek any further relief in that case, which remains pending (Lackawanna County No. 2013-CV-2309). Petitioner also did not pursue an inverse-condemnation proceeding against the Township as provided for under Pennsylvania's Eminent Domain Code. (A-5).

Instead, in November 2014, Petitioner filed this suit against the Township in the United States District Court for the Middle District of Pennsylvania, alleging multiple violations of her First, Fourth, Fifth and Fourteenth Amendment rights under 42 U.S.C. § 1983. (A-5). After motions to dismiss and amendments, Petitioner's only remaining claim was her claim seeking compensation for the alleged taking under the Fifth and Fourteenth Amendments. (B-6; A-5, 6).

B. The District Court's Dismissal

The District Court granted the Township's motion to dismiss Petitioner's Takings Clause claims. (Appendix B, Memorandum Decision and Order of September 7, 2016). The District Court noted that such claims must satisfy "unique ripeness requirements" under *Williamson County*. (B-11). Relevant here, plaintiffs must seek just compensation from the state before claiming that their right to just compensation under the Fifth Amendment has been violated, as long as the state provides adequate procedures for compensation. (B-11). Pennsylvania law provides compensation procedures through its Eminent Domain Code, and those procedures have been held to be

constitutionally adequate. (B-14). Because Petitioner failed to satisfy the state procedure exhaustion requirement, her Takings claim was not ripe for federal review, and the District Court dismissed it without prejudice. (B-12, 16-18).

C. The Third Circuit's Affirmance

Petitioner appealed, arguing that her Takings claim was a "facial" Takings claim that was exempt from the exhaustion requirement. (A-21). The Third Circuit rejected that argument and affirmed the District Court's dismissal. The Third Circuit explained that this Court has used the word "facial" in two conceptually distinct ways: to describe a type of "taking" where the mere enactment of a provision itself constitutes a taking, and to describe a type of legal challenge that seeks to invalidate a taking rather than obtain just compensation. (A-23).

Petitioner's argument failed to distinguish between facial takings and facial challenges. A facial taking does not violate the Fifth Amendment unless it is uncompensated. (A-23, 24). A facial challenge, on the other hand, does not seek compensation; it attacks the underlying validity of the law, an issue that "arises logically and temporally prior to the denial of compensation," so "there is no reason to wait for compensation to be denied; the constitutional violation would occur at the moment the invalid statute or regulation becomes effective." (A-24).

Importantly, Petitioner's claims were not facial challenges; rather, they were "unavoidably, claims for compensation." (A-26; *see also* A-27-28, quoting Petitioner's Second Amended Complaint). Petitioner's

argument that the Ordinance was invalid because it did not provide a self-contained mechanism for compensating property owners was rejected in *Williamson County*: "[T]he Fifth Amendment [does not] require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking." (A-28, quoting *Williamson County*, 473 U.S. at 194). Accordingly, Petitioner's claims under the Just Compensation Clause were subject to *Williamson County*'s exhaustion requirement, and were properly dismissed.[3]

REASONS FOR DENYING THE PETITION

Petitioner recites the same arguments seeking reversal of *Williamson County* that this Court unanimously rejected two months ago in *Wayside Church v. Van Buren County*, 2017 U.S. LEXIS 6615 (Petition for Writ of Certiorari denied October 30, 2017). This Court also denied petitions attempting to avoid *Williamson County* in *Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409, 2016 U.S. LEXIS 2830 (April 25, 2016) (with Justices Thomas and Kennedy dissenting), and in *Alto Eldorado Partnership v. Santa Fe County*, 565 U.S. 880 (October 3, 2011).[4]

---

3. The Third Circuit also rejected Petitioner's alternative arguments that she should be deemed to have complied with *Williamson County* and/or that *Williamson County's* prudential requirements should be overlooked in the interest of "efficiency"(A-28-32), and Petitioner did not pursue those arguments in her Petition.

4. *See* 2017 U.S. S. Ct. Briefs LEXIS 2489, *36-53 (petition

This Petition should likewise be denied. This Court has reaffirmed *Williamson County*'s prudential state litigation requirement multiple times in the three decades since that case was decided. The requirement is founded in the very language of the Fifth Amendment, and is consistent with Article III's requirement of a case or controversy, with other principles of federalism, and with the recognition of the uniquely complex and local issues presented by land use regulation. Even if there were any basis to revisit *Williamson County*'s prudential requirement that state compensation procedures be pursued before a facial takings compensation claim is ripe (which is denied), this would be the wrong case to do so, because the petition asserts hypothetical concerns about *Williamson County* that simply do not exist in this case.

Petitioner's allegations of a conflict among the circuits, or between the Third Circuit's decision and this Court's jurisprudence, fail for the reasons set forth in the thorough and thoughtful opinion authored by Third Circuit Chief Judge Smith, joined by former Chief Judge Theodore A. McKee and Senior Judge Marjorie O. Rendell. That opinion correctly disposed of Petitioner's arguments, and in particular, carefully explained the distinction between claims seeking compensation for facial takings (like this case) and facial legal challenges, which do not seek compensation and thus do not require a plaintiff to seek state compensation first.

---

in ***Wayside Church***); 2015 U.S. S. Ct. Briefs LEXIS 4105, *23-40 (petition in ***Arrigoni Enterprises***); U.S. S. Ct. No. 11-50, petition in ***Alto Eldorado*** filed July 8, 2011, pp. 11-16.

I. There is No Important Question to Consider: This Court Has for Decades Reaffirmed *Williamson County*'s Prudential State Litigation Requirement, has Denied Certiorari in Response to the Same *Williamson County* Arguments, and this Case Would be Particularly Inappropriate for Any Reconsideration of *Williamson County*

The Fifth Amendment does not proscribe the taking of property; it proscribes the taking of property without just compensation:

> [N]or shall private property be taken for public use, without just compensation.

U.S. Const. Amend. V; *see Williamson County*, 473 U.S. at 194. In *Williamson County*, this Court held that a claim for compensation on the basis that a government action had effected a taking of private property is not ripe until (1) the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue, and (2) the plaintiff has unsuccessfully exhausted the state's procedures for seeking just compensation, as long as the state provides adequate procedures for doing so. *Williamson County*, 473 U.S. at 186, 194-95 (1985).

There is no dispute here that Pennsylvania's Eminent Domain Code provides Petitioner with an available, adequate compensation remedy,[5] and that she has not

---

5. Pennsylvania's Eminent Domain Code, 26 Pa. C.S. §§ 101-1106, provides a well-organized procedure for seeking just compensation for an alleged taking. *Cowell v. Palmer Township*, 263 F.3d 286, 290-91 (3d Cir. 2001). Section 701 of the Code mandates compensation for a taking: "A condemnee shall be

pursued any such remedy. Instead, Petitioner seeks to avoid that remedy by asking this Court to overrule *Williamson County*. Petitioner argues that her challenge is "facial," that "facial" takings claims are ripe without regard to state court compensation procedures, that *Williamson County*'s ripeness requirement "destroys" takings claims, and that the ripeness requirement is "doctrinally flawed and unnecessary." Each argument is meritless.

A. Petitioner is not making a "facial" challenge; rather, her claim is "unavoidably" a claim for compensation

Petitioner's Petition should be rejected for the simple reason that her challenge in this case is not "facial." Rather, as the Third Circuit recognized, Petitioner's claim is "unavoidably" one for compensation. (A-27).

---

entitled to just compensation for the taking, injury or destruction of the condemnee's property, determined as set forth in this chapter. Other damages shall also be paid or awarded in this title." 26 Pa.C.S. § 701 (emphases supplied). Chapter 5 of the Code describes in detail the procedure to pursue relief through inverse condemnation proceedings for an alleged taking. Importantly, Section 102 states that the Code procedures are complete and exclusive: "This title provides a complete and exclusive procedure and law to govern all condemnations of property for public purposes and the assessment of damages." 26 Pa.C.S. §102(a). *See also, e.g., York Rd. Realty Co., L.P. v. Cheltenham Twp.*, 136 A.3d 1047, 1050 (Pa. Commw. 2016) ("[W]e have held that the [Code] provides the exclusive method and practice governing eminent domain proceedings, including de facto takings[.]"); *Linde Enters., Inc. v. Lackawanna River Basin Sewer Auth.*, 911 A.2d 658, 661 (Pa. Commw. 2006) ("It is well established that the Code provides the exclusive method and practice governing eminent domain proceedings, including de facto takings.")

The Third Circuit explained that Petitioner was conflating two "conceptually distinct" uses of the word "facial": (1) facial challenges (a type of legal challenge that seeks to invalidate a statute *rather than* obtain just compensation), and (2) facial Takings (which assert a claim that a statute on its face constitutes a taking that requires payment of just compensation to the property owner). *See* Third Circuit Opinion. (A-23). The Third Circuit correctly recognized that despite Petitioner's attempt to dress up her challenge to the ordinance as a "facial" challenge, her claim was "unavoidably" one for compensation:

> Despite their being characterized as facial challenges, [Petitioner's] claims are, unavoidably, claims for compensation.
>
> [Petitioner] does not claim that the alleged taking violates the Public Use Clause. Furthermore, the District Court dismissed the due-process claims asserted in [Petitioner]'s original complaint, and [Petitioner] does not appeal that ruling. All that remains is the allegation that the Township violated the Fifth Amendment because it took [Petitioner]'s property *without compensation*.
>
> . . .
>
> To be sure, [Petitioner]'s Second Amended Complaint seeks injunctive relief. But [Petitioner] has no surviving claim that the *taking itself* was invalid, apart from the fact that she has not received compensation. The remedy for an uncompensated (but otherwise valid) taking is compensation.

(A-26-27, emphasis in original). The Petition even admits this is a claim for compensation. (*See, e.g.*, Petition at 22). Petitioner's claims "are therefore subject to exhaustion under *Williamson County*." (*Id.*, A-27).

Petitioner nevertheless continues to make the same "facial" error here, lumping these distinct concepts together and referring to the combination as "facial takings claims." (Petition at 11-12). Petitioner does not even address the Third Circuit's opinion in this regard. Petitioner's claim remains, "unavoidably," a claim for compensation, not a facial challenge to the validity of the statute, and it was properly dismissed as unripe.

B. Petitioner's criticisms of *Williamson County* misstate the reach of that case

Petitioner next argues that *Williamson County* should be reviewed because it demands that every taking claim be preceded by a state court lawsuit (*id.* at 12), "forecloses both federal and state court review" or "prevents state court review" (*id.* at 15-20), and is "doctrinally flawed and unnecessary." (*Id.* at 20-24). In *San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 345 (2005), this Court stated, "Petitioners have overstated the reach of *Williamson County* throughout this litigation." The same is true here.

First, *Williamson County* does not "demand" a state court lawsuit prior to the assertion of any and all challenges relating to a federal takings claim. (Petition at 12). On the contrary, *Williamson County*'s prudential state compensation requirement does not apply to cases raising facial legal challenges. In fact, that is what this

Court stated in *San Remo*: the plaintiffs were never required to "ripen" their facial challenges, which "by their nature requested relief distinct from the provision of 'just compensation,'" in state court; they could have raised them directly in federal court. *San Remo*, 545 U.S. at 344-45. *See also, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (facial challenge regarding whether a governmental action constitutes a "taking"); *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 543 (2005)(state compensation requirement would not apply to determination of whether a governmental action fails to meet the "public use" requirement). *Williamson County's* state compensation requirement also does not apply where there is no state compensation process available. *Asociacion de Subscripcion Conjunta del Seguro de Responsibilidad Obligatorio v. Flores Galarza*, 484 F.3d 1 (1st Cir. 2007). Moreover, as a prudential requirement, it may be excused in appropriate circumstances as a matter of discretion. *See, e.g., Wilkins v. Daniels*, 744 F.3d 409, 417 (6th Cir. 2014).

Second, *Williamson County* does not "destroy" takings claims. Petitioner argues that "the Full Faith and Credit statute [sic] bars federal courts from hearing a case after a related state court suit," *citing San Remo*. (Petition at 16-17). However, as this Court pointed out in *San Remo*, the plaintiffs in that case were not required to submit their facial challenges to the state court; they could have litigated such challenges in the federal court from the beginning. Alternatively, they could have reserved those facial challenges, which were distinct from the compensation claims, and pursued only the latter. The plaintiffs instead chose to advance broader issues, and having "gratuitously" presented those issues to the

state court, could not get a second bite at the apple by relitigating the same substantive issues in federal court. *San Remo*, 545 U.S. at 344-346. In any event, there is no preclusion issue in this case. Quite the contrary: Petitioner "did not pursue the complete and exhaustive procedure to obtain compensation[.]"(A-29, citation omitted).

This Court in *San Remo* also rejected the argument, made again by Petitioner here, that plaintiffs are entitled to a federal forum for any and all federal claims, regardless of prior litigation:

> [Petitioners] ultimately depend on an assumption that plaintiffs have a right to vindicate their federal claims in a federal forum. We have repeatedly held to the contrary. ... The relevant question in such cases is not whether the plaintiff has been afforded access to a federal forum; rather, the question is whether the state court actually decided an issue of fact or law that was necessary to its judgment.

San Remo, 545 U.S. at 343. In fact, the argument that a claimant asserting federal rights is always entitled to a federal forum has been "emphatically" rejected by this Court:

> There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.

Id., *citing Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 86 (1984), and *Allen v. McCurry*, 449 U.S. 90, 93 (1980).

Petitioner's argument that removal of cases from state to federal court renders the ripeness doctrine "illusory" and leaves "many" federal takings plaintiffs "without any access to the courts" (Petition at 18-19) is speculative and meritless. A facial challenge may always be brought in federal court, as discussed above. If the plaintiff files an action seeking compensation in a state court and the case is improperly removed, it will be remanded to the state court. *See, e.g., A Forever Recovery, Inc. v. Township of Pennfield*, 2013 U.S. Dist. LEXIS 189092 (W.D. Mich. 2013) (remanding and also awarding attorneys' fees for bad faith removal), *aff'd* 606 Fed. Appx. 279 (6th Cir. 2015). Alternatively, federal courts may waive the prudential ripeness requirement — and have done so — where defendants removed state claims to federal court and then claimed they were unripe. *See, e.g., Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014); *Sansotta v. Town of Nags Head*, 724 F.3d 533 (4th Cir. 2013). These options counter any concern about a potential for manipulation. *See Arrigoni, supra*, 136 S. Ct. at 1409 (2016) (Thomas, J., dissenting). In any event, this case does not involve removal, so this is another completely speculative argument.

Third, *Williamson County*'s longstanding ripeness requirement is not "doctrinally flawed" or "entirely unnecessary." (Petition at 20). On the contrary, it is entirely consistent with, and derived from, the Fifth Amendment itself: only a taking without just compensation violates the Amendment, so no constitutional violation can

occur until that compensation has been determined. The ripeness requirement is also fully consistent with Article III's requirement limiting federal court jurisdiction to cases involving a justiciable case or controversy. *See* U.S. Const. Art. III, § 2. The ripeness requirement is consistent with other principles of federalism such as abstention: the state government entity may choose to pay for the taking, or may withdraw the regulations. *See First English Evan. Luth. Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 317 (1987).

Finally, the ripeness requirement is consistent with the recognition, as set forth in *San Remo*, that state courts are not only "fully competent to adjudicate constitutional challenges to local land-use decisions," but that "Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations." *San Remo*, 545 U.S. at 347. *See also Suitum, supra*, 520 U.S. at 725 at 738-39 (noting that local land-use boards characteristically possess a high degree of discretion and flexibility). Petitioner attempts to avoid that important consideration by alleging that "in almost all takings cases" the state is not the entity taking the property or compensating for it (Petition at 21), but that argument is also unavailing. If there is no applicable state compensation procedure, *Williamson County*'s requirement would not apply anyway. In any event, that argument is another "red herring" because in this case, the alleged taking was by a state entity.

For all of these reasons, the Petition does not demonstrate any basis for granting a Writ of Certiorari.

C. This Court has rejected other recent petitions making the same arguments against *Williamson County*

Petitioner's arguments in this case, and the arguments of *amici*, rehash the arguments made in other recent cases. In *Alto Eldorado Partnership v. Santa Fe County*, 565 U.S. 880 (2011), a number of local businesses and resident landowners challenged an Ordinance which required property owners to build affordable housing for the county's residents. The Tenth Circuit applied *Williamson County*'s state litigation requirement, and found that Petitioners had not exhausted their state court remedies, thereby leaving their federal takings claims unripe. This Court unanimously denied certiorari.

Similarly, in *Arrigoni Enterprises v. Town of Durham*, 136 S. Ct. 1409* (2016), a company was denied excavation permits on the basis that the specific type of excavation required was prohibited by ordinance in that zone. The company was denied injunctive relief in state court, and subsequently filed suit in the federal district court seeking compensation for the alleged taking. The district court dismissed the plaintiff's takings claims as unripe under the *Williamson County* state litigation requirements, because the plaintiff had not pursued monetary compensation pursuant to Connecticut's inverse condemnation statute. *Arrigoni Enters., LLC v. Town of Durham*, 18 F. Supp. 3d 188 (D. Conn. 2014). The plaintiff subsequently petitioned this Court, arguing that "the Court should reconsider *Williamson County*'s unworkable demand that property owners exhaust state court procedures to ripen federal takings claims." 2015 U.S. S. Ct. Briefs LEXIS 4105, *23. This Court once again denied certiorari.

Most recently, in *Wayside Church v. Van Buren County*, 2017 U.S. LEXIS 6615 (U.S., Oct. 30, 2017), the plaintiff-landowners failed to pay property taxes, and their properties subsequently became subject to forfeiture and foreclosure. *Wayside Church v. Van Buren County*, 847 F.3d 812 (6th Cir. Mich., Feb. 10, 2017). The plaintiffs did not pursue any state court remedy, claiming that there was no available remedy. The district court agreed "that no adequate state procedures existed in which Plaintiffs could challenge the alleged taking." *Id.* at 818. The Sixth Circuit reversed, finding that the plaintiffs could have brought their claims in state court, and therefore, the issue was unripe for review in federal court. *Id.* at 822. Again, the plaintiff subsequently petitioned this Court, arguing that "[t]his case raises an important issue as to whether the Court should reconsider *Williamson County*'s demand that property owners exhaust state court procedures to ripen federal takings claims." 2017 U.S. S. Ct. Briefs LEXIS 2489, at 19. Once again, this Court unanimously denied certiorari.

This case presents no more compelling interest to revisit *Williamson County* than any of the above cases. In fact, this would be a particularly inappropriate case to reconsider *Williamson County*, because the hypothetical concerns of Petitioner and the *amici* regarding *Williamson County* simply do not exist here: there was no improper removal of a state case, no danger of issue preclusion, no lack of an appropriate forum, a complete and adequate remedy available in state court, and the alleged taking is by a state entity, not a federal one. *Amici* also suggest that this Court should "clarify" the status of substantive due process claims, but this case does not present any such claims. This Court should deny certiorari.

II. There is no Conflict Among the Lower Courts Regarding the Application of *Williamson County* Ripeness Requirements to Claims for Compensation

Petitioner next argues that this Court should reconsider *Williamson County* because of what Petitioner claims is a "deep conflict" in the lower courts as to whether *Williamson County* bars "facial takings claims." *See* Petition at 24. According to Petitioner, the First, Fourth and Seventh Circuits are on one side of the purported "split." In those circuits (which she describes as "*Williamson County*-free circuits"),"takings plaintiffs" are "free to raise facial Fifth Amendment challenges in federal courts in the first instance." *See Petition* at 24-25. Petitioner puts the Sixth, Ninth and Tenth Circuits on the other side of the "split," with the Third Circuit now "siding with" them in applying *Williamson County* to "facial takings claims." Petition at 27-29.

In rejecting Petitioner's claim of conflict, the Third Circuit explained that this "seeming inconsistency" arises from the use of the word "facial" in two distinct ways. One use of "facial" refers to a legal challenge that does not seek compensation. The other use of "facial" refers to a type of taking, which does not violate the Fifth Amendment unless the plaintiff has been denied compensation. Petitioner nevertheless continues to lump these "conceptually distinct" uses together as "facial takings claims," and argues that the circuits treat such claims inconsistently.

A review of the "conflicts" alleged by Petitioner shows that there is no circuit conflict, and that the Third Circuit was correct: its decision in this case, and its prior decision in *County Concrete Corp. v. Town of Roxbury*, 442 F.3d

159 (3d Cir. 2006), are "fully compatible" with this Court's jurisprudence. In cases involving facial legal challenges, the courts do not require exhaustion of state compensation remedies. However, in cases seeking compensation for takings, the courts do require such exhaustion unless there is a reason to excuse the failure to pursue it.

The First, Fourth and Seventh Circuit cases. The cases cited by Petitioner from the First, Fourth and Seventh Circuits involved facial challenges to the statutes or regulations, claims for compensation whether the *Williamson County* state exhaustion requirement was unavailable or excused, or claims for compensation where Williamson County was enforced. *See Philip Morris, Inc. v. Reilly*, 312 F.3d 24 (1st Cir. 2002) (facial challenge to regulatory takings claim); *Asociacion de Subscripcion Conjunta del Seguro de Responsibilidad Obligatorio v. Flores Galarza*, 484 F.3d 1 (1st Cir. 2007) (plaintiff allowed to proceed in federal court without having pursued a state compensation remedy because there was no available and adequate state court remedy for the alleged taking; the court distinguished the unusual situation in that case from cases like this one, where a state proceeding for inverse condemnation is available and "[r]equiring plaintiffs to avail themselves of such a procedure before bringing a federal takings claim protects the state's opportunity to use the scheme it designed specifically to avoid constitutional injury."); *Clayland Farm Enterprises, LLC v. Talbot County, Md.*, 672 F. App'x 240, 244 n.6 (4th Cir. 2016) (compensation claims were deemed ripe where the plaintiff had filed the case in state court, the defendant county had removed it to federal court, and "Maryland does not have a separate statutory or inverse condemnation remedy to challenge an alleged regulatory taking of property.");

Holliday Amusement Co. of Charleston South Carolina, 493 F.3d 404, 407 (4th Cir. 2007) (affirming the district court's dismissal because the plaintiff was "maintaining this suit for just compensation[,]" and "[b]eing such a suit, state procedures for the award of just compensation must be utilized."); *International Union of Operating Engineers Local 139 v. Schimel*, 863 F.3d 674 (7th Cir. 2017) (affirming that the plaintiff's challenge in that case was a pre-enforcement facial challenge, and therefore was ripe under that exception to Williamson County even though the plaintiff did not first seek just compensation in the state court); *Peters v. Village of Clifton*, 498 F.3d 727, 733 (7th Cir. 2007), *cert. denied*, 552 U.S. 1251 (2008) (affirming the district court dismissal of the plaintiff's claim as unripe because the plaintiff failed to seek compensation in the state court, and explicitly rejecting the plaintiff's argument that it would be futile to litigate in the state court: "In Illinois, inverse condemnation is a judicially recognized remedy arising out of the self-executing takings provision of the Illinois Constitution" as recognized by the Illinois Supreme Court); *Muscarello v. Ogle County Bd. of Com'rs*, 610 F.3d 416, 422 (7th Cir. 2010), *cert. denied*, 562 U.S. 1200 (2011) (affirming the district court's dismissal of the plaintiff's takings claim as unripe because the plaintiff did not pursue state compensation procedures, and in doing so, rejecting the plaintiff's attempt to couch her claim as a "facial challenge": "It is true that pre-enforcement facial challenges to the constitutionality of a law under the Takings Clause are not subject to the exhaustion requirement. ... But Muscarello's claim is not a pre-enforcement facial challenge. She has focused on the economic deprivation that she herself will suffer if and when the taking occurs – the characteristic 'as applied' challenge.").

The Fifth and Eleventh Circuit cases. The cases cited by Petitioner from the Fifth and Eleventh Circuits likewise involved facial challenges not subject to *Williamson County*'s state litigation exhaustion requirements. *See Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 286-87 (5th Cir. 2012) (even if *Williamson County* applied to a Religious Land Use and Institutionalized Persons Act ("RLUIPA") challenge to an ordinance, the finality requirement of *Williamson County* would not bar a facial challenge to an ordinance); *Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach, Fla.*, 727 F.3d 1349, 1359 n.6 (11th Cir. 2013) (facial challenge to ordinance was not subject to *Williamson County*'s finality requirements).

The Third, Sixth, Ninth and Tenth Circuit cases. Finally, the case law from the Third, Sixth, Ninth and Tenth Circuits applies *Williamson County* the same way as the First, Fourth and Seventh Circuits: it does not apply to facial challenges, but does apply (unless excused) to claims for compensation. *See Wilkins v. Daniels*, 744 F.3d 409, 417 (6th Cir. 2014) (applying *Williamson County* to Just Compensation challenge, and rejecting the plaintiffs' attempt to characterize their claim as a "facial" challenge, an argument that "oversimplifies Takings Clause jurisprudence." The plaintiffs were seeking compensation for a facial taking, and therefore *Williamson County*'s state litigation requirement applied.)[6] ; *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 407 (9th Cir. 1996)

---

6. The *Wilkins* court nevertheless went on to address the merits, noting that *Williamson County* ripeness is a prudential doctrine, that no jurisprudential purpose is served by delaying consideration of a claim that "clearly has no merit," and that the statute at issue did not effect a "taking." *Wilkins*, 744 F.3d at 418-19.

(facial challenge to statute as not advancing a legitimate state interest was ripe; claim that the regulations deprived him of economically viable use of his property was not ripe, because he had not sought compensation)[7]; *Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura*, 371 F.3d 1046, 1053 (9th Cir. 2004) (rejecting plaintiff's attempted to avoid *Williamson County*'s ripeness requirement by arguing that its facial takings claim did not seek compensation, but rather, sought to adjudicate "constitutionality;" this argument was "belied by [the plaintiff's] claims for damages."); *Surf and Sand, LLC v. City of Capitola*, 377 F. App'x 662, 664 (9th Cir. 2010) (rejecting the plaintiff's facial challenge to an ordinance (that it was not for a "public use"), and holding that the facial takings claim was not ripe because the plaintiff had not pursued compensation in state court or alleged that the state remedies were deficient).

The last Tenth Circuit case Petitioner cites, *Alto Eldorado Partnership v. County of Santa Fe*, 634 F.3d 1170 (10th Cir. 2011), *cert. denied* 565 U.S. 880 (2011), warrants particular mention here, because the Tenth Circuit rejected the same arguments being made here in seeking to avoid *Williamson County*'s ripeness requirement, and this Court unanimously denied certiorari. The plaintiff-developers in *Alto Eldorado* alleged that their challenge was a "facial" one in that they were arguing that the regulation at issue did not substantially advance a legitimate state interest. The Tenth Circuit held that

---

7. Although Sinclair's facial challenge was ripe, the Ninth Circuit concluded that the district should apply *Pullman* abstention to defer adjudicating that claim. *Sinclair*, 96 F.3d at 409, *citing Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

"[d]espite the developers' insistence, the claim the developers bring here under the Takings Clause is not a facial claim challenging the validity of the regulation itself." Rather, their claims were that the ordinances "do not provide for any compensation for the burdens they place." *Id.* at 1175. In so holding, the Tenth Circuit emphasized that facial challenges, which do not depend on whether the property owner is compensated, "differ dramatically" from takings claims seeking compensation. *Id.* at 1175-76.

In sum, Petitioner's claim that there is widespread disagreement among the circuit courts, and/or that the First, Fourth, and Seventh circuits have held that "facial takings claims" are "exempt" from *Williamson County*, is error and mischaracterizes those decisions. The Circuit split alleged by Petitioner does not exist.

III. There is no Conflict Between the Third Circuit's Decision and this Court's Decision in *Williamson County*

Petitioner's last argument is that the Third Circuit's decision conflicts with this Court's takings precedents, because (according to Petitioner) her "facial takings claims" are exempt from *Williamson County*'s state court exhaustion requirement. Petitioner continues to make the same error the Third Circuit pointed out, and which was discussed above: she fails to distinguish between facial challenges and claims seeking just compensation for facial takings. *See* Petition at 29-31. Instead, Petitioner merely recites, almost verbatim, passages from the petitions this Court denied in *Wayside Church*, *Alto Eldorado*, and *Arrigoni*. *See* footnote 4, supra.

Petitioner also continues to rely upon the same cases she cited in the Third Circuit, which still do not support her attempt to avoid *Williamson County*. For example, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) was not a "facial takings case" filed "without concern for state remedies" as Petitioner claims. Rather, *Keystone* resolved a facial challenge, not a takings claim for compensation, in which the parties stipulated to seek certification on the question of whether the regulations that restricted mining constituted any "taking." The case of *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) likewise did not involve any claim for compensation; it was a pre-enforcement challenge to a federal statute, and this Court's holding was contrary to Petitioner's current argument. This Court rejected the plaintiffs' facial challenge, and held that any taking claim under the Compensation clause was premature. Moreover, any compensation in *Hodel* would be owed by the federal government, not the state (*see* 452 U.S. at 305-306), so *Hodel* is certainly not an example of a federal court affording merits review of a claim for compensation "without prior state court litigation," as Petitioner claims.

In *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997), only the "final decision" requirement of *Williamson County* was at issue, not the exhaustion requirement. The cited footnote from *Suitum* (regarding "facial" challenges being ripe when the challenged regulation is passed), refers to exactly what the Third Circuit explained above. A facial challenge is ripe when a regulation is passed. However, while a regulation may constitute a facial taking when it is passed, that taking does not violate the Fifth Amendment (*i.e.*, it is not ripe) unless it is uncompensated.

Petitioner similarly cites *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 344-45 (2005) for the proposition that the plaintiffs there were never required to "ripen" their claims in state court, but rather, could have raised them in directly in federal court. *See* Petition at 30. However, those were facial challenges – that the statute did not "substantially advance" state interests – which the plaintiffs "gratuitously" presented to the state court. *San Remo*, 545 U.S. at 344. This Court emphasized that the facial challenges "by their nature requested relief distinct from the provision of 'just compensation.'" *Id.* at 345. Finally, Petitioner cites two circuit court decisions, *Peters, supra*, and *Opulent Life, supra*. The *Peters* case merely notes the general principle that facial challenges can be litigated immediately in federal court, and directly contradicts Petitioner's argument here: the court in *Peters* affirmed the dismissal of the plaintiff's takings claim (which was not a facial challenge) because the plaintiff did not pursue compensation in state court or demonstrate that those procedures were inadequate. In *Opulent Life*, the case was a facial challenge (unlike this case). The cases of *F.C.C. v. Florida Power Corp.*, 480 U.S. 245 (1987) and *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 244-45 (1986) (Petition at 32), likewise involved facial challenges, and neither involved any potential "state remedies." In both cases, this Court held that the respective federal statutes at issue did not effect Fifth Amendment "takings" requiring compensation. See *F.C.C.*, 480 U.S. at 250-254; *Connolly*, 475 U.S. at 221-228. In sum, not one of the cases cited by Petitioner represents a "merits review" of a "facial takings claim" for compensation without requiring, or appropriately excusing, the exhaustion requirement.

Finally, Petitioner erroneously argues that a statute may be "facially" challenged if it does not provide a "concurrent mechanism" for compensating property owners (*see* Petition at 30-31 and n. 3). That argument was explicitly rejected in *Williamson County*: "[T]he Fifth Amendment [does not] require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking." (A-28, quoting *Williamson County*, 473 U.S. at 194).

In sum, as the Third Circuit correctly held, its decision in this case is "fully compatible" with this Court's jurisprudence.

CONCLUSION

For all of the foregoing reasons, the petition for certiorari in this case should be denied.

Respectfully submitted,

TERESA FICKEN SACHS
Counsel of Record
MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN
2000 Market Street, Suite 2300
Philadelphia, PA 19103
(215) 575-2000
tfsachs@mdwcg.com

Attorneys for Respondent